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FEDERAL COMMUNICATIONS COMMISSION MAR 1 1 2003
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
Definition of Radio Markets	)	MM Docket No. 00-244

MOTION TO BIFURCATE AND REPEAL

Media General, Inc. ("Media General'.), by its attorneys, hereby urges the Commission to act expeditiously to repeal the newspaper/broadcast cross-ownership rule and, if such action cannot be taken in spring 2003, to bifurcate consideration of the rule from this proceeding and promptly repeal it.

Unlike all the other ownership rules at issue in this omnibus proceeding, the newspaper/broadcast cross-ownership ban restricts the activities of an industry that is outside the FCC's jurisdiction. Moreover, the rule has gone unmodified since its adoption in 1975, despite FCC review in numerous proceedings over the last decade. In each of these reviews, the FCC has been faced with an ever growing volume of evidence demonstrating that the rule should be repealed. Indeed, the very extensive record now before the FCC establishes conclusively that the rule is no longer "necessary in the public interest" and that it is actually hindering newspapers' and broadcasters' efforts to provide new arid innovative information services that meet the demands of their ever-changing communities.

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Unlike the case with some other media ownership rules, the public interest benefits of repeal of the newspaper/broadcast cross-ownership rulc are so clear and inescapable, that its prompt elimination is required, particularly tinder Section 202(h) of the Teleconimunications Act of'1996 ("1996 Telecom **Act").** The FCC has said that it hopes to reach a resolution of this omnibus procccding in spring of 2003. If it finds that deadline impossible to meet, however, hccause of deliberation over other rules at issue in the docket, the FCC should bifurcate its consideration of the newspaper/broadcast cross-ownership rule from the rest of the proceeding, so that its review and repcal may be completed within the spring 2003 deadline the FCC has set for itself. Any other course -- delaying review of the rule and/or ultimately retaining sonic aspect of its cross-ownership restrictions -- would be contrary to law

I. In Adopting the Newspaper/Broadcast Cross-Ownership Rule in 1975, the FCC Did Not Identify Any Concrete Harm the Rule Was Intended to Remedy, and the Extensive Record on the Rule the FCC Has Amassed More Recently Fully Supports Its Prompt and Complete Repeal.

In 1075, the FCC asserted authority under the Communications Act to adopt a rule flatly prohibiting newspaper publishers, who hold no spcctrum-related assets, from acquiring and operating broadcast stations in markets in which their newspapers are published. Pointedly, the FCC adopted this ban. not because it cited any "basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership,"[1] or because any claim had been made that "newspaper-television station owners [had] committed any specific non-competitive acts."[2] bur solely because "[w]e think that any new licensing should be expected lo add to local

[1] *Amendment of Sections 73.34[sic], 73.240. irnd 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television* ***Broadcast*** *Stations, Second Report and Order*, 50 FCC 2d 1046. 1075 ("*Second Report and Order*"), *recons.*, 53 FCC 2d 589 (1975), *aff'd sub nom., FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) *("NCCB').*

[2] *Second Report and Order, 50* FCC 2d at 1073.

diversity."[3] Although well-intentioned, the FCC conjectured that the rule would improve diversity despite making a number of contrary empirical findings on the record. For instance, the FCC found that there generally was significant diversity or "separate operation" between commercially owned broadcast stations and newspapers.[4] Moreover, a study of licensee programming conducted by the FCC's staff documented that newspaper-owned stations rendered more locally oriented service.[5] On appeal, both reviewing courts explicitly recognized the lack of any documented public interest harm compelling adoption of the rule.[6]

More than a quarter century later, the newspaper/broadcast cross-ownership rule still exists despite profound growth in media outlets and owners, liberalization of all other media ownership rules, and a mountain of evidence on the rule unheeded by the FCC that shows, in study after study in contrast to the predictive judgments upon which the FCC relied in 1975, that cross-ownership does not harm any of the FCC's articulated policy goals and that the rule, in fact, now hinders the provision of news and innovative media services. When the *Notice of Proposed Rulemaking* in this omnibus ownership proceeding was issued last fall,[7] it was at least the eighth time in almost as many years that the FCC had considered or been asked to consider

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[3] *Id.* at 1075

[4] *Id.* at 1089.

[5] *Id.* at 1078 n. 26.

[6] Specifically, the United States Court of Appeals for the District of Columbia Circuit found that the FCC had adopted its new flat ban "without compiling a substantial record of tangible harm," noting that the rule was based on a record that included "little reliable 'hard' information." *Nat'l Citizen Comm. for Broad. v. FCC*, 555 F.2d 938, 944, 956 (D.C. Cir. 1977), *aff'd in part and rev'd in part on other grounds, NCCB*. The United States Supreme Court, in affirming the FCC's ban, similarly commented on the "inconclusiveness of the rulemaking record," stating that the FCC "did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily 'speak with one voice' or are harmful to competition." *NCCB*, 436 U.S. at 795, 786.

[7] *Notice of Proposed Rulemaking*, FCC 02-249 (rel. Sept 23, 2002) ("*2002 Proceeding*") ("*2002 NPRM*")

the rule's possible repeal. Time and again, as noted in the following chronology, the FCC has collected more and niorc evidence supporting rcpcal, and each time has failed to take action on the evidence. promising repeatedly to act hut never doing so:

- *ABC/Cap Cities.* In February 1996, the FCC first professed interest in reform of the newspaper/broadcast cross-ownership rule when, in approving the sale of ABC/Cap Cities **Io** Disncy. it rejected the applicant's well-documented request for permanent waivers for commonly-owned radio and newspaper properties and instead issued temporary, twelve-month waivers. At the same time, the FCC promised to "proceed expeditiously with an open proceeding to consider revising our newspaper/broadcast cross-ownership policies."[8]

- *1996 NOI.* In October 1996, the FCC launched a *Notice* of *Inquiry* seeking comment on possible revision of its newspaper/*radio* cross-ownership policies."[9] Despite a full briefing cycle of comments and a record that favored liberalization of the newspaper/broadcast cross-ownership standard, the FCC never acted on the *Nolice.*

- *First NAA Petition.* Concerned over the FCC's delay in addressing the newspaper/broadcast cross-ownership rule, the Newspaper Association of America **("NAA")** in April **1997** filed a "Petition for Rulemaking" urging the FCC to coninience a proceeding to eliminate all restrictions on common ownership of newspapers and broadcast stations.[10] The FCC did nothing in response to the tiling.

- *Second NAA Petition.* In August 1999, **NAA** submitted an "Emergency Petition for Relief," again urging repeal and expressing concern over newspapers' ability to remain competitive with other media outlets, particularly in light of the significant liberalization earlier thal month of the television duopoly and radio/television cross-ownership rules."[11] The FCC did nothing in response to this filing.

- *1998 Biennial Review.* As required by the 1996 Telecom Act, the FCC in March 1998 commenced a biennial review of its media ownership rules.[12] In this review, which treated the two **NAA** petitions as comments, the FCC received overwhelming

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[8] *Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5851 (1996).

[9] *Newspaper/Radio Cross-Ownership Waiver Policy. Notice of Inquiry*, 11 FCC Rcd 13003 (1996).

[10] Newspaper Ass'n of America, Petition for Rulemaking in the Matter of Amendment of Section 73.3555 of the Commission's Rules To Eliminate Restrictions on Newspaper/Broadcast Station Cross-Ownership, filed April 27, 1997.

[11] Newspaper Ass'n of America, Emergency Petition for Relief in MM Docket Nos. 98-35 and 96-197, filed Aug. 23, 1999.

[12] *1998 Biennial Regulatory* **Review** – *Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Inquiry*, 13 FCC Rcd 11276 (1998).

support for repeal or modification of the newspaper/broadcast cross-ownership rule. The report that the FCC issued in June 2000, however, ignored the weight of the record evidence favoring repeal, devoting only a few cursory paragraphs to the rule and stating it continued to serve the public interest by furthering diversity." In the same report, the FCC again committed to initiate a rulemaking proceeding to consider altering the rule but gave no specific indication as to when that might commence."

- *2000 Biennial Review.* In fall *2000,* the FCC launched its 2000 Biennial Review proceeding, releasing an initial staff report upon which it sought comment.[15] In the final report concluding the proceeding, which was issued in January 2001, the FCC did not alter any of the recommendations that had been made with respect to the newspaper/broadcast cross-ownership rule in the *1998 Biennial Review Report* and, as before, promised initiation of a rulemaking proceeding focused on the rule at some unspecified time in the future.[16]

- *2001 Newspaper/Broadcast NPRM.* A few months later, in April 2001, the FCC's new Chairman testified on Capitol Hill that within a month the agency would initiate a review of the newspaper/broadcast cross-ownership rule.[17] Five months later, in September 2001, the FCC finally released a notice of proposed rulemaking, seeking

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[13] *1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Biennial Review Report*, 15 FCC Rcd 11058, 11105-11110 (2000) ("*1998 Biennial Review Report*"). In his separate statement, then Commissioner Powell noted that "I cannot support the conclusion that the newspaper/broadcast cross-ownership restrictions continue to serve the public." (*Separate Statement of Comm'r Michael K. Powell*, 15 FCC Rcd 11140, 11157 ("*Separate Powell Statement*").)

[14] *1998 Biennial Review Report*, 15 FCC Rcd at 11105

[15] *Federal Communications Commission Biennial Regulatory Review 2000,* CC Docket No. 00-175, *Staff Report,* 15 FCC Rcd 21089 (rel. Sept. 19, 2000).

[16] *2000 Biennial Regulatory Review Report*, CC Docket No. 00-175, *Report*, 16 FCC Rcd 1207, 1218 (2001). Within the same month, the FCC on reconsideration affirmed the liberalization of its local television ownership rules. *Review of the Commission's Regulations Governing Television Broadcasting, Memorandum Opinion and Second Order on Reconsideration*, **16** FCC Rcd 1067 (2001).

[17] "FCC Ownership Cap Review To Focus on Competition Plus Diversity," *Communications Daily*, Apr. 2, 2001, p.6. *See also* "Powell Questions Future Role of Over-the-air TV," *Communications Daily*, Apr. 6, 2001, p. 1. ("As for broadcast-newspaper cross-ownership limits, . . . Powell said 'I'm pretty skeptical' about the need for such continued restrictions. 'It's [cross-ownership rule] a hard sell.' he said. 'I don't know why there's something inherent about a newspaper and something inherent about a broadcaster that means they can't be combined.' Powell said agency would consider repeal as well as reform of the rule. 'I suspect there'll be support for a willingness to ask the [repeal] quesiion,' he said.")

comment on elimination of the newspaperibroadcast cross-ownership rule." In response, the FCC received virtually unanimous industry support for repealing the rule, and numerous economic and prograinniing studies denionstrating repeal to be in the public interest. Of the scores of substantive comments the FCC received, only a handful opposed repeal, and they filed to support their doctrinal arguments about the need lor the rule's retention with any substantive, empirical studies that met Section 202(h)'s burden for sustaining the rule.'' Despite an extensive record favoring repeal, the FCC once again chose not Lo act and launched this omnibus proceeding."'

- *2002 Omnibus NPRM.* In September 2002, the FCC released a ruleniaking notice, seeking comment on all its media ownership rules." In the course of the proceeding, the FCC also published twelve studies it had commissioned. The six that touched on issues relevant to the newspaper/broadcast cross-ownership rule provided no basis, conceptual or empirical, for the proposition that the rule is necessary in the public interest as the result of competition or for any other reason. Rather, the studies further established repeal of the rule is long overdue.[22] As was true in the *2001 Proceeding,* the few parties that argued for retention of the rule drew almost exclusively on speculative arguments and unproven theories, offering principally anecdotes and, in no event, the type of proof required by Section 202(h).

Common throughout all the comments opposiny repeal of the newspaper/broadcast cross-ownership rule is a profound misunderstanding of the newsgathering resources and financial commitment required to deliver high-quality local news and information to the public. The same coniments also reflect a complete unawareness of the fact that local media content at successful outlets is not dictated on a "top-down" basis but is consumer-driven and responsive to the needs of the audiences they serve. The opponents of rcpeal cling to the simplistic and erroneous notion

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[18] *Cross-Ownership of Broadcast Stations and Newspapers, Newspaper/Radio Cross-Ownership Waiver Policy, Order and Notice of Proposed Rulemaking*, MM Docket Nos. 01-235 and 96-197, FCC 01-262 (rel. Sept. 20, 2001) ("*2001 Proceeding*").

[19] The only "data" presented in the *2001 Proceeding* by opponents of repeal consisted of unsupported, and unsupportable, musings that common ownership will increase advertising rates; a study of the levels of concentration in 10 radio and 10 television broadcast markets, expressed in each case by calculation of Herfindahl-Hirschman Indices; and isolated anecdotes. *See* Reply Comments of Mcdia General in *2001 Proceeding,* at 18-28, filed Feb. 15, 2002.

[20] "FCC Plans Omnibus Blockbuster Report on TV-Radio Ownership." *Communications Daily,* June 18. 2002; *2002 NPRM.*

[21] *2002 NPRM.*

[22] *See generally* discussion of the studies in Comments of Media General in *2002 Proceeding,* filed Jan. 2, 2003 (:'Media General 2002 Comments"), at 38-52.

that maximization of the number of separate media owners is the only way to ensure diversity and competition in the local information marketplace. In light of the very real financial constraints and pressures facing broadcasters and newspaper publishers in today's vigorously competitive environment. however. eliminating the ban is the FCC's best option for ensuring continued vitality and improvement in local news and infomiation available to the public."

II. If This Omnibus Rulemaking Becomes Stalled, the General Public Interest Standard as Well as Specific Legal Authority, Such as Section 202(h), Mandate Separate Consideration and Prompt Repeal of the Newspaper/Broadcast Cross-Ownership Rule.

The FCC has now spent many years reviewing the newspaperibroadcast cross-ownership rule, compiling an extensive record confirming the lack of any basis for its retention and the harm it is causing to news delivery and innovation, and then repeatedly doing nothing. As the media industry has recoynizcd and called to the FCC's attention in virtually unanimous comments, the current system is broken. Diversity of viewpoint does not require diversity of ownership, and the newspaper/broadcast cross-ownership ban has resulted in non-economic ownership "islands." Both worsening financial conditions in the media sector and the economy overall and increasing competition from larger national and international players, which typically present the same undifferentiated ion-local infomiation in all markets, have caused many television stations in both large and small communities to curtail or terminate local newscasts.[24] Prompt repeal of the rule is needed to stem and help reverse this decline.

Prompt consideration and rcpeal of the newspaperibroadcast cross-ownership rule is also required because the rule is the only FCC media ownership restriction that applies to an industry,

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[23] *See, e.g.*, Mcdia General 2002 Comments at 60, 65-70; Comments of Newspaper Ass'n of America in *2001 Proceeding*, filed Dec. 3, 2001, at Sections IV and VI.B.

[24] The number of news cancellations and curtailments has now grown to almost 50. ***See*** Reply Comments of Mcdia General in 2002 *Proceeding*, tiled Feb. 3, 2003, at Appendix D.

newspaper publishing, which does not utilize spectrum. The other rules at issue in this proceeding address ownership of assets the FCC does regulate. They regulate combinations of television networks and limit the number of stations that may be owned in a local market, held in combination with other stations, and, for television, possessed on a national basis.

Moreover, no other unregulated industry, whether related to broadcasting or not, is covered by the FCC's media ownership rules. The FCC does not flatly prohibit combined investments in broadcast licensees and other businesses that may be allied closely with broadcasting, such as advertising agencies, representation firms, broadcast equipment manufacturers, program suppliers, and networks. Neither does it restrict owners of other unregulated media outlets, such as Internet sites and outdoor billboards, from purchasing broadcast stations even though some of those other outlets compete just as plausibly as newspapers do with currently regulated niedia in advertising sales and/or news and content delivery. Nor has the FCC made any suggestion that it contemplates drawing any of these broadcast-related services or unregulated outlets within the scope of a cross-ownership rule.

Similarly, since the FCC does not regulate newspapers, any attempt to now count them as "voices" under a broad unitary rule that would continue to restrict their ownership activities would bc indefensible. Any attempted quantification of the value, content, or competitiveness of an unregulated newspaper in measuring its "voice" relative to an FCC-regulated entity is almost certain to fail on appeal. Nothing in the record of this or previous proceedings could guide the FCC to such a quantification, and nothing can. Neither is there any basis in this record for line-drawing or the type of analysis that arguably may be appropriate in addressing national television ownership limits or local television duopoly standards.

Nol moving promptly to eliminate a rule that restricts ownership activities of an industry outside its jurisdiction on a record that fails to establish that such ownership causes any public

interest harm raises a host of legal issues -- under the Constitution, the Administrative Procedure Act, and the Communications Act, as amended -- that the FCC would he hard pressed to defend." In particular, given the extensive record arid lack of any substantiated harm, retention of the newspaperlbroadcast rule and delay in promptly repealing it violate Section 202(h) of the 1996 Telecom Act."' As the United States Court of Appeals for the District of Columbia Circuit made clear in *Fox Television Stations, Inc. v. FC'C,* this provision establishes a rigorous deregulatory program that goes as much to timing as to substance.[27] Not only did ***Fox*** establish that Section 202(h) "carries with it a presumption in favor of repeal or modification of the ownership rules,"[28] a finding that was reiterated in *Sinclair Broadcast* **Group,** *Inc.* ***v.*** *FCC* and unchanged by the *Fox* rehearing decision,[29] but both *Fox* and *Sinclair* rejected the FCC's practice of deferring decisions while it "observes" marketplace developments." The Court left

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[25] For discussion of the equal protection and administrative law issues raised by the rule, *see, e.g.*, Media General 2002 Comments at 30-34; Comments of Media General in *2001 Proceeding*, filed Dec. 3, 2002, at 60-66, 76-80.

[26] Section 202(h) provides:

> The Commission *shall* review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and *shall* determine whether any of such rules are ncccssary in the public interest as the result of competition. The Commission *shall* repeal or modify any regulation that it determines to bc no longer in the public interest.

Pub. L. No. 104-104. § 202(h), 110 Stat. 56 (1996) (emphasis supplied).

[27] 280 F.3d 1027 ("*Fox*"), *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002) *("Fox Rehearing")*. For a more in-depth discussion of Section 202(h), *see. e.g.*, Media General 2002 Comments at 25-30 and Comments of Fox Entertainment Group. Inc., *et al.* in 2002 ***Proceeding,*** filed Jan. 2, 2003. at Exhibit 1.

[28] 280 F.3d at 1048

[29] *Sinclair Broadcast Group, Inc.* 1. *FCC*, 284 F.3d 148, 152 *(D.C.* Cir. 2002) ("*Sinclair*"), *rehearing denied*, 2002 U.S. App. Lexis 16618, 16619 ***(en*** *banc*) (D.C. Cir. Aug. 12, 2002); *Fox Rehearing.* 293 F.3d at 541.

[30] *Fox*, 280 F.3d at 1044; *Sinclair*, 284 F.3d ai 164. In finding that Section 202(h) establishes a strong dercgulatory presumption, the Court vindicated the view previously expressed by then Commissioner Powell in his separate statement in the 1998 *Biennial* ***Review*** *Report*:

continued...

no doubt that this "wait-and-see approach cannot he squared with [the] statutory mandate [to act] promptly – that is, by revisiting the matter biennially – to 'rcpcal or modify' any rule that is not 'necessary in the public interest.'"[31] Thus, any exlended delay in repealing the newspaper/ broadcast cross-ownersliip rulc, particularly when the rccord shows conclusively that the rule is unnecessary, violates Section 202(h).

III. Conclusion

Lacking any substantiated basis for continuing to ban newspaper ownership of broadcast properties, the FCC should promptly eliminate newspapers from the scope of its media ownership rules. Ifscparating the newspaper/broadcast cross-ownership rule from the entire proceeding is necessary for such expeditious action, the FCC should bifurcate this proceeding to ensure that completc repeal of the newspaper/broadcast cross-ownership rule is accomplished in spring 2003.

Respectfully submitted,

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> I believe the clear bent of the biennial review process set out by Congress is deregulatory, in recognition of the pace of dramatic change in the marketplace and the understanding that healthy markets can adequately advance the government's interests in competition and diversity. Thus, contrary to the approach of the majority, I start with the proposition that the rules are no longer necessary and demand that the Commissionjustify their continued validity.

Separate Powell Statement, 15 FCC Rcd at 11 I51.

[31] *Fox*, 280 F.3d at 1044; *Sinclair*, 284 F.3d at 164.